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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 219

ANTHONY FERNANDEZ, BURL ELTON DALGLIESH, and CARL G. PRATT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 329 F. 2d 899.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1964 (Pet. App. 20). A petition for rehearing was denied on April 29, 1964 (Pet. App. 20). On May 25, 1964, Mr. Justice Douglas extended

the time for filing a petition for a writ of certiorari to and including June 28, 1964. The petition for a writ of certiorari was filed on June 26, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a case where four defendants were being tried jointly before a jury, the trial court abused its discretion in refusing to reopen their cases to hear the testimony of a fifth defendant being tried to the court without a jury, where the jury had retired, had already reached a decision on some counts, and where the four co-defendants had rested their defenses without making inquiry as to whether the fifth defendant would testify.

2. Whether, where the court of appeals upsets a conviction of four defendants on a conspiracy count, there must, as a matter of law, be a new trial on substantive counts on the ground of improper joinder.

RULES INVOLVED

Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) *Joinder of Offenses.*
>
> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more

acts or transactions connected together or constituting parts of a common scheme or plan.

(b) *Joinder of Defendants.*

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

1. The three petitioners, together with Joseph P. Delay and Raymond Dual, were tried under two indictments returned in the Western District of Washington charging violations of 18 U.S.C. 2314 and conspiracy (R. 1-8, 38-42).[1] The sufficiency of the

[1] The record on file with the Clerk is in eleven volumes. The first volume containing copies of papers filed below is designated herein as "R." The other ten volumes containing the typewritten transcript of the evidence are separately paginated and are designated as "Tr."

evidence is not challenged in this Court and is therefore summarized only briefly as a background for the contentions raised.

The case, centering around petitioner Fernandez, involved fraud in the sale of timber and in banking transactions tied to timber operations.

(a) Under Counts 2 and 3, in which petitioner Fernandez alone was charged and convicted,[2] the evidence showed that on March 21, 1958, Fernandez and William E. Belcher left from Portland, Oregon, for Tye, British Columbia, to inspect timber which Fernandez was trying to sell (Tr. 143-153, 761-763). Fernandez had told his bank that he expected Belcher to transfer $40,000 by wire from Belcher's bank account to his account to complete a transaction (Tr. 419-422). On March 22, a person who identified himself as Belcher caused $40,000 to be transferred from Belcher's account to Fernandez (Tr. 570-588, 532-533). On March 23, Belcher and Fernandez attempted to inspect timber at Tye (Tr. 153-165) and on March 24, Belcher was found dazed beside a railroad track with head wounds, unaware of the cause of his injury (Tr. 166-173, 238, 245-250, 631-632). Belcher then learned of the unauthorized transfer from his bank account (Tr. 210). Three documents that he had never previously seen—a $40,000 receipt, a logging contract and a memorandum agreement—were in his suitcase (Tr. 176-177, 636, 797, 977). Co-defendant Delay, a lawyer, had sent a copy of the

[2] Fernandez was acquitted by the jury on Count 1, which charged that he caused William E. Belcher to travel in interstate commerce on March 3, 1958.

logging agreement to another attorney, purportedly at the request of Belcher (Tr. 983-989, 1004).

(b) Under Count 4, in which Fernandez and Delay were charged, it was shown that Fernandez obtained a check for $25,000 from the Royal Bank of Canada on false representations that the Portland Trust Company would guaranty the loan (Tr. 1142-1177). Fernandez was convicted on this count; Delay was acquitted.

(c) Under Count 5, in which Fernandez, Dual and Dalgliesh were named, it was shown that in March, 1959, Fernandez and Dual, representing the D & M Contracting Co., exhibited timber in Oregon to Edwin Cone of the Cone Lumber Company, showing a government tag at the site marking the particular tract and also a report of the Starr Cruising Company describing the timber on this tract. Cone gave Fernandez $61,000 for the tract (Tr. 1466-1475, 1514, 1533, 1542, 1546-1547), and later discovered that a different tract was conveyed to his company. When he demanded his money back, Fernandez refused his request, telling him that he had been confused and the money had been invested and was no longer available (Tr. 1477-1483). Ultimately Cone was able to recover $30,000 (Tr. 1496-1499). Petitioner Pratt notarized the deeds by which D & M Contracting Co. acquired and conveyed the property (Tr. 1475, 1569-1571, 1601). Fernandez and Dual were convicted on this count; Dalgliesh was acquitted.

(d) Count 6 charged petitioners Fernandez, Dalgliesh, and Dual, and all three were convicted. The evidence showed that shortly before May, 1959, Dal-

gliesh took a buyer of the Stevenson Co-Ply Company to 40 acres of timber near Kelso, Washington, said to be owned by Dual, and pointed out to him the corners of the tract and the government tag at the site (Tr. 1653, 1657, 1723). Dalgliesh gave him a cruise report of the Starr Cruising Company, the company which he owned. When the buyer asked to see other cruises (reports concerning the grade and amount of timber on the tract), Dalgliesh handed him what purported to be another cruise report and arranged for a telephone conversation with a person falsely identified as another cruiser (Tr. 1652, 1657-1664, 2037). On May 1, 1959, the Stevenson Co-Ply Company paid Dual $30,000 for the tract (Tr. 1732-1740). The description of the property purchased was the same on the deed of conveyance and on the Starr report (Tr. 1712-1713, 1725). Later the company found that it actually had purchased barren property which had been logged. When it notified Dual, he claimed that he did not know anything was wrong and declared that the money he received had been either invested or lost (Tr. 1679, 1741). Dual, with Dalgliesh's assistance, had acquired the 40 acres shortly before the sale to Stevenson (Tr. 1780-1804). There was evidence to indicate that Fernandez had received some of the proceeds of the sale (Tr. 1822-1836).

(e) Under count 7, Fernandez, Pratt and Dual were charged and all three were convicted. Claiming to represent a New York Syndicate, they obtained an option to buy timber from John L. Casteel (Tr. 2290-2306). On April 28, 1961, Casteel went on a trip with

Fernandez for the purpose of examining timber near Nelson, British Columbia, returning to Spokane on May 1 (Tr. 2307-2320). The next morning they had breakfast with Delay, and discussed the Canadian timber (Tr. 2321-2323). On May 3, 1961, after a timber inspection trip near Longview, Washington, with Casteel, Fernandez jumped out of the vehicle he was driving, saying he had lost control. The vehicle dropped over a 60-foot bank, but was stopped by a log from a complete drop (Tr. 2333-2335). The next day Casteel, who had been injured, saw for the first time papers dated April 28, 1961, purporting to transfer his timber to the Forest Timber Product Company for assignments of timber options. The signature of Casteel, notarized by Pratt, was on the deed; the assignments were also notarized by Pratt (Tr. 2337-2358). On May 2, 1961, Delay made an offer to buy the Canada timber in Casteel's behalf, which the latter said was not authorized (Tr. 2358-2360).

(f) Count 1 of the second indictment named Fernandez, Pratt and Dual, who were all convicted. In November, 1960, Fernandez obtained a deed to timber on the representation that the document was a contract to remove timber. This deed was notarized by Pratt (Tr. 1962-1982, 1998-2008, 2160-2172). Pratt and Dual tried to sell this timber to Dominic Tarabochia for $3,500 or $4,000, giving him a false cruise sheet. They later tried to sell him some equipment (Tr. 2058-2076), but Tarabochia did not purchase either the property or the equipment (Tr. 2078-2085).

(g) The second count of the second indictment charged a conspiracy among all the defendants to perpetrate all of these frauds. Petitioners were convicted on this count but the court of appeals reversed, finding that the evidence did not show a single over-all conspiracy.[4]

2. Prior to trial, petitioners Fernandez, Pratt and Dalgliesh and defendant Dual filed motions for "an order of segregation of defendants and for separate trials of unrelated offenses" (R. 29-33, 55-56). More particularly, they contended that particular counts should be tried separately as being unrelated to the remaining counts, arguing that the proof would fail to show a single conspiracy.[4] These motions were denied. Defendant Delay then filed a waiver of his right to be tried by jury, requesting that his case be heard by the court at the same time as the other defendants were tried by the jury. He asserted that "the matters for Mr. Delay are more legal in nature and the facts probably are not much in dispute." The government consented to this waiver and it was ap-

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Fernandez was sentenced to imprisonment for a total of eleven years and eleven months. (R. 76-78). Dalgliesh was sentenced to imprisonment for a period of three months and a sentence of 27 months was suspended except for the period of imprisonment (R. 81-82). Pratt was sentenced to imprisonment for a period of two years and eleven months (R. 79-80). Delay, who waived trial by jury, was acquitted by the court on all counts in which he was charged (R. 71-72).

[4] The court severed counts charging bankruptcy frauds (R. 50-51).

proved by the court (R. 58-59).[7] Petitioners did not oppose Delay's request. Petitioners' motions for separate trials were renewed at the close of the government's case (Tr. 3169-3170).

The government closed its case on Thursday, December 20, 1962. At that time counsel for Fernandez suggested that if the government would restrict the time needed for its summation, petitioners would rest their case immediately so that the jury would get the case before the weekend. When the government agreed, petitioners rested their case without offering any testimony and announced they were ready to proceed with final arguments. Delay, however, who was being tried by the court at the same time without a jury, did not rest (Tr. 3171-3174, 3187-3189).[8] He had not as yet made or waived the opening statement which he had reserved at the beginning of the case (Tr. 25). The next day the court adjourned the case until December 26 after all parties consented to the request of the jury for a Christmas recess. The court indicated that it might allow petitioners to reopen their case after the recess if they so requested (Tr. 3203-3208). Following the recess, on December 26, final arguments were made to the jury (Tr. 3213) and on December 27, the court charged the jury (Tr. 3215), advising them in its instructions that Delay

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[7] Delay had previously moved for a separate trial on the ground that publicity about defendant Reubel Lenske would prejudice him (R. 52-54).

[8] The court had asked Delay's attorney if he planned to go forward with his case on December 26 but it is not clear whether counsel for Pratt was in the courtroom at the time (Tr. 3184, 3187).

had elected to be tried before the court (Tr. 3215-3216). The case against petitioners was then submitted to the jury and the case against Delay was continued to further order (Tr. 3269). That evening the jury reported that it had reached a decision on some counts (Tr. 3270). On the following day, while the jury was deliberating, Delay testified in his own defense before the court concerning his relationship with Fernandez and his connection with Belcher (Tr. 3273-3277, 3286-3287), Casteel (Tr. 3277-3281), and the Royal Bank of Canada (Tr. 3281-3284), and was cross-examined by the government (Tr. 3287-3375). Shortly before the conclusion of his examination, petitioners moved for a mistrial on the ground that "evidence in the trial was given in the absence of the jury and without notice to the defendants bearing on the issues that were set for trial." Alternatively they requested that the jury be returned to hear Delay's testimony (Tr. 3375-3376). Their motion was denied by the court. Following the return of the jury verdict, the court found Delay not guilty.

ARGUMENT

1. Petitioners were not compelled over objection to have their case presented with a defendant who had waived jury trial. Petitioners did not oppose Delay's request that his case be tried by the court at the same time as the jury heard the case against the other defendants. In the trial court, they did not urge Delay's waiver of jury trial as a ground for a separate trial nor did they otherwise voice any objection to this procedure at that time. If petitioners had objected, the

court might in response have required either that Delay's case be submitted to the jury along with that of the other defendants, or that it be severed. Cf. *Fitzgerald* v. *United States Lines*, 374 U. S. 16. The procedure followed was neither burdensome nor confusing. This is demonstrated by the fact that during the trial petitioners did not complain about the conduct of Delay's counsel in making objections and cross-examining witnesses. Indeed a reading of the record creates the impression that petitioners' attorneys welcomed his assistance and with the exception of a statement admitted only against Delay, the government's case against petitioners would have been substantially similar if Delay had not been a party.[7]

The only actual prejudice claimed is that petitioners did not have the benefit of Delay's testimony, which took place after their cases had been submitted to the jury. But petitioners themselves showed no timely interest on this score. Instead of suggesting or indicating that they desired to have an opportunity to present Delay's testimony to the jury, they announced that they were ready for final argument before Delay had rested his case. Petitioners could have made inquiry of Delay's counsel as to whether Delay was to testify and could have refused to close until they were advised as to what Delay planned to do. Instead it

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[7] The court first received a statement made by Delay to an F. B. I. agent concerning the Royal Bank of Canada and Belcher against all defendants (Tr. 2999-3009) but later instructed the jury that such statements should only be considered as evidence against the declarant (Tr. 3079-3081).

was only after the jury announced that it had arrived at a verdict on some counts that petitioners expressed interest in Delay's testimony and sought to reopen the case. Petitioners are thus in no better position to complain than if Delay's case had been heard separately and they had sought to reopen their defense on the ground that his testimony constituted newly discovered evidence. Their request rested within the sound discretion of the court. In view especially of petitioners' lack of reasonable diligence, there was no abuse of discretion. See *United States* v. *Bayer*, 331 U. S. 532, 537-539.

2. The court of appeals reversed the conspiracy convictions, finding that there was neither evidence showing a single over-all conspiracy nor evidence showing that Dalgliesh or Pratt knew of the existence of such a conspiracy. Relying on *Schaffer* v. *United States*, 362 U. S. 511, it then rejected the theory that the failure of the conspiracy count in itself caused a misjoinder of substantive counts. Pointing to no particular prejudice, petitioners Dalgliesh and Pratt request that this Court reconsider *Schaffer* and establish an absolute rule of error *ab initio* whenever a conspiracy count ultimately fails.

We see no occasion for the Court to reexamine *Schaffer* in this case. The conspiracy charge brought against petitioners was not the result of any "loose practice." *Id.* at p. 524 (dissenting opinion). Fer-

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Fernandez apparently does not complain of the joinder of defendants, since he was involved in each of the substantive counts.

nandez and his related timber transactions reasonably appeared to be the nexus creating one single over-all scheme. The appearance of Delay in fraudulent transactions both in the early and late stages of the conspiracy charged lent support to this conclusion. To be sure, Dalgliesh and Pratt were not participants in every one of the frauds involved, but a conspirator need not be involved in every part of a conspiracy and need not know the part that other conspirators have or will play. There was therefore justification to conclude that Dalgliesh and Pratt had a rôle in an over-all scheme and to charge them as conspirators. Indeed, even while reversing the conspiracy convictions, the court of appeals stated that the evidence might establish "several diverse conspiracies radiating from Fernandez, in all of which he participated, and in one or two of which Dalgliesh and Pratt participated." (Pet. App. 12). Thus, joinder may have been proper here even in the absence of the conspiracy count, since Rule 8 permits a joinder of defendants when the offenses arise out of "the same series of acts or transactions constituting an offense or offenses."

The joinder here caused no particular prejudice to Dalgliesh and Pratt. As the court of appeals found, "the evidence as to each was not particularly complex and was sufficiently compartmentalized so that the jury would have no unusual difficulty in keeping the evidence as to each separate in their own thinking. The best indication of this is that the jury did not indiscriminately convict all defendants on all counts on

which they were charged, but acquitted on counts where the evidence was weak." (Pet. App. 13)*

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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* Fernandez was found not guilty on count 1 and although Fernandez and Dual were found guilty on count 5, Dalgliesh was found not guilty on that count.

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